IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: ANSAH, JSC (PRESIDING)
DOTSE, JSC
MARFUL-SAU, JSC
DORDZIE (MRS), JSC
AMEGATCHER, JSC

CIVIL APPEAL
SUIT NO. J4/12/2019

5TH FEBRUARY, 2020

COMFORT OFFEIBEA DODOO …….. PLAINTIFF/RESPONDENT/ RESPONDENT
(SUBSTITUTED BY VIVIAN ANKRAH)

VRS

NII AMARTEY MENSAH …… DEFENDANTS/APPELLANTS/APPELLANTS
(SUBSTITUTED BY DAVID OBODAI & ORS.)

JUDGMENT

DOTSE, JSC:-

INTRODUCTION

This is an appeal from the Judgment of the Court of Appeal Coram Gyaesayor, Aduama Osei, and Dzamefe J.J.A dated 12th May, 2016. Being dissatisfied with the judgment, the Defendants/Appellants/Appellants, hereafter referred to as Defendants have filed this appeal to the final appellate court through a notice of appeal dated 22nd June, 2016.

RELIEFS CLAIMED BY THE PLAINTIFF IN THE HIGH COURT

The Plaintiff/Respondent/Respondent, hereafter referred to as the Plaintiff by its amended writ of summons claimed against the Defendants the following reliefs:

a) Declaration of title to all that piece or parcel of land situate and being at Amasaman and bounded on the North by the properties of Kofi Adjiri, on the South by the property of Kpakpo-Oti, on the East by the property of Otoo Kwao and on the West by the property of Nii Armah and covering an area of 229.67 acre more or less and indicated on a site plan edged Red and showing the measurements.
b) Damages for trespass and destruction of food crops and laying waste of farm lands
c) An order to cancel the registered document registered as NO.R.225/97 later amended by order of High Court dated 25/7/2013 to No. 767/1999covering an approximate area of 176.67 acres.
d) Perpetual injunction to restrain the Defendants their assigns, representatives, agents, servants, and anyone claiming any right or interest through them from alienating or working on the land, winning sand or in any way doing anything on the land against the interest of the plaintiff, the subject matter of this suit forever.

THE TRAJECTORY OF THE STATE OF THE PLEADINGS IN THE HIGH COURT

The plaintiff on the 20th of September, 2000 issued out a writ which was accompanied by a statement of claim.

On the 9th of February, 2005 an amended statement of claim was filed with leave of the Court granted on 28th January, 2005. The Defendants filed a statement of defence on 6th

November, 2000. On the 15th of February, 2005 the 1st -5th Defendants filed an amended statement of defence and counterclaim with leave of the court dated 10th February, 2005. On the 8th of March 2005, the Plaintiff pursuant to leave of the court filed an amended reply to the amended statement of defence and defence to counterclaim. A second amended statement of defence by the 1st -5th defendants was filed on the 14th of February, 2012 pursuant to leave granted on the 14th of February, 2012. The Plaintiff filed an amended reply to the amended statement of defence and defence to the counterclaim on 8th March, 2012 pursuant to leave granted by the court on 1st March, 2012.

THE CASE OF THE PLAINTIFF

It is the case of the original plaintiff, Comfort Offeibea Dodoo that she is the daughter and surviving Executrix of the late Mercy Naa Aponsah who died Testate, leaving a Will, probate of which was granted by the High Court, and that she is the beneficiary of the said Will together with the Atu We, Adjebu We, and the Ayikushie We families by bequest from the Will of the Late Mercy Naa Aponsah also known as Mercy Dodoo.

That probate of the said Will was granted on 5th May 1988 by the High Court, Accra. **In 1979, the land covered by the Will was plotted at Koforidua Lands Commission, in the Eastern Region as No.1582/1979 by the testatrix.** The pleadings further asseverate that before the Registration, she informed all her boundary owners that she was going to demarcate her land so they should be present during the exercise.

This piece of evidence had been confirmed by the evidence of Plaintiff herself P.W.2 Anane Foli, PW3, Agnes Ogborvi, PW4, Nii Amo Djan, DW5, Selasi Kofi Segbo and DW6, Amahia Mawutor, whose family had been caretakers and farmers on the land respectively.

It was the case of the Plaintiff that, the Testator's family had exercised overt acts of occupation, dominion, possession and ownership on the land by themselves and also allowing settler farmers to settle for long periods of time and also alienating portions to others to farm on portions of the land and aliening portions to developers without let or hindrance from the Defendants and their predecessors for long periods of time.

The Plaintiff further contended that, her family had been collecting yearly rent from the tenant farmers in kind through their caretakers, who also lived on the farms on the land.

Sometime in 1999, the plaintiff had information that the Defendant's family, which is the Nii Tetteh Mensah Family of Pobiman had applied for registration of part of the plaintiff's land. She got her solicitor to file a caveat by the solicitor's letter dated 5th February, 1999. Nothing was heard from the Lands Commission until she heard in August 2000 that a portion of her family land had been registered by the Nii Tetteh Mensah Family as NO.R225/97 at Accra and this she said was fraudulent since the land had already been plotted at Koforidua Lands Commission. **The plaintiff claimed that crops of the tenant farmers were then destroyed by the Defendants for sand winning and other developments.**

The Plaintiff further contended that, in 2002, she received a letter from the Lands Commission Secretariat, Koforidua which letter directed her to present her title

documents together with receipts evidencing payment for registration and stamping in 1979 to the office of plotting in Greater Accra Region. She submitted the said documents to the Greater Accra Office and was issued with a Land Title Certificate No. GA16410 in the name of the original Plaintiff, since at that time Mercy Naa Aponsah was dead and it was the original Plaintiff who was issued with probate.

THE CASE OF THE DEFENDANTS

It is the case of the defendants that the original 1st Defendant is the head of Nii Tetteh Mensah family of Pobiman, with the 2nd and 3rd Defendants being principal members of his family and that it is the 1st Defendant who permitted the 4th and 5th Defendants to enter the land. The 1st, 2nd and 3rd Defendants claim the land to be for their family as the land was acquired by settlement over ninety (90) years ago precisely in 1910 by their ancestor during hunting and farming and they have been in possession since then without let or hindrance from anyone.

They had also granted portions to tenant farmers who have villages, or hamlets or farms on portions of the land in dispute. The Defendants pleaded that there was a village called Tesano on the land which name was given by Zorve their tenant farmer.

The Defendants therefore counterclaimed as follows against the Plaintiff, claiming the following:

a. An order setting aside the plaintiff's document registered as Land Registry No. 1582/1979 with file No. ER257/79

b. An order setting aside Land Title Certificate No. GA 16410, to the extent that they cover Defendants Land comprised in document with Land registry No. 797/1999.

TRIAL, AND DECISION OF THE HIGH COURT

After the issues had been set down for trial, the case then proceeded to trial with both parties testifying and calling a total of fifteen (15) witnesses. Whilst the Plaintiff called eight (8) witnesses, the Defendants on the other hand, called seven, (7).

At the end of the trial, the High Court Accra, presided over by S. H. Ocran J on the 22nd day of March, 2013 delivered judgment in favour of the Plaintiff and stated in part as follows:

> ***"There is no evidence before me that as at the time that the Plaintiff instituted this action, as the surviving executrix and trustee as disclosed by Exhibit 'A', her power as an administratrix had been revoked by a court of competent jurisdiction. That being the state of affairs, at the time that she instituted the action; she had the capacity to initiate the action since the other executor had then died.*** *It has been held in the case of* ***Djin vrs Musah Baako (2007-2008) SCGLR 686*** *that*
>
> ***"The right of an action to recover land of an intestate accrues from the date of the grant of Letters of Administration"***
>
> *In this case, the Plaintiff was the only surviving executrix at the time she commenced the action and the probate had not been set aside.* ***It is therefore***

my holding that the plaintiff has capacity to initiate this action in protection of the devised property."

On the issue of possession, the court held that:-

"*The evidence of the parties may be said to be traditional and may be difficult to tell who is giving the true account except that, that of the Defendants have been contradicted by various witnesses, whereas some of the evidence of the Plaintiff have been corroborated by some of the witnesses of the Defendants. However, considering recent acts of ownership and taking into consideration the Ewe settler farmers on the land for over 60 years, on the authority of the plaintiff's family and the inability of the Defendants to challenge their occupation for all these years, as I said, I do not believe the Defendants witnesses who claimed to have collected "adode" for the Defendants at a time they themselves have not been appointed caretakers, I hold that the Plaintiff's acts of possession is more conversant with an owner of the land than the defendants claim which is inconsistent with that of an owner of land.*

From the totality of the evidence I enter judgment for the plaintiffs as follows:

a. *The Plaintiff is declared title to the piece or parcel of land in claim "a"*
b. *The Plaintiff is awarded GHc50,000.00 damages for trespass to the said land*

c. *The Lands Commission is ordered to cancel document Registered as No. R225/97.*

d. *The Plaintiff is to recover possession of the land*

e. *The Defendants, their agents, servants, privies, etc are perpetually restrained from entering the land in dispute, and or to have anything to do with the land described in claim "a"*

The Defendants counterclaim is dismissed. The Plaintiff is awarded cost of GHc15, 000.00

Dissatisfied with the judgment of the High Court, the defendants appealed to the Court of Appeal through a notice of appeal filed on the 17th of June, 2013.

JUDGMENT OF THE COURT OF APPEAL

On 12th May, 2016, the Court of Appeal unanimously dismissed the appeal filed by the Defendants and held per Aduama Osei J.A who spoke on behalf of the Court as follows:

> ***"What I have not found in this appeal however is a demonstration by the Defendants that the findings, conclusions and decisions of the trial court did not have reasonable support from the record. This court will therefore not disturb the trial Court's decision that the Plaintiff is the owner of the disputed property. It should follow that the decision of the trial Court dismissing the Defendants' counterclaim will not be disturbed.***

Now if the Plaintiff is the owner of the disputed land, then given that the Defendants' admit that their entry of the land was in their own right and without the consent of the Plaintiff, the trial Court's decision awarding the plaintiff damages for trespass cannot be questioned*. Again the Plaintiff will in the circumstances be entitled to the restraining order made in her favour against the Defendants in respect of the disputed land.*

This means the appeal has failed in its entirety and the same is dismissed*. Cost of One Thousand Ghana cedis (₵1,000.00) against each of the Appellants in favour of the Respondent." Emphasis supplied*

APPEAL TO SUPREME COURT AND GROUNDS OF APPEAL

The Defendants being dissatisfied with the decision of the Court of Appeal, have appealed to this Court on the grounds below:

a. The judgment is against the weight of the evidence
b. The Court of Appeal erred on the issue of capacity which has created exceptional circumstances meriting this appeal
c. Further grounds to be canvassed upon receipt of the Record of Proceedings

CONCURRENT FINDINGS OF FACT

In considering this appeal, we have decided to examine in some detail, the general principle of law which states that,

"Findings of fact made by a trial court, and concurred in by the first appellate court, i.e. the Court of Appeal, then the second appellate court, such as the Supreme Court must be slow in coming to different conclusions ***unless it was satisfied that there were strong pieces of evidence on record which made it manifestly clear that the findings of the trial court and the first appellate court were preserve****." Emphasis*

See cases such as

1. ***Thomas v Thomas [1947] ALL E.R. 582***
2. ***Powell v Streatham Manor Home [1935] A.C. 243 at 250***
3. ***Doku v Doku [1992-93] GBR 367***
4. ***Koglex Ltd. (No.2) v Field) 2000 SCGLR, 175***
5. ***Akufo-Addo v Cathline [1992] 1 GLR 377***
6. ***Achoro v Akanfela [1996-97] SCGLR, 209, holding 2***
7. ***Obeng v Assemblies of God Church, Ghana [2010] SCGLR 300***

However, it must also be clearly noted that, as has been stated in the general principle stated supra, **an appellate court, especially a second appellate court and a final court like this court, has on stated grounds verifiable from the record of appeal departed from the findings of fact concurred in by the first appellate court.**

In the locus classicus decision of this court in the case of ***Gregory v Tandoh IV and Hanson [2010] SCGLR 971***, the Supreme Court, coram, *Georgina Wood C.J, presiding,*

Rose Owusu, Dotse, Gbadegbe and Vida Akoto-Bamfo (JJSC) speaking with unanimity through Dotse JSC, laid down the said principles as follows:-

> *"However, a second appellate court, like the Supreme Court, could and was entitled to depart from findings of fact made by the trial court and concurred in by the first appellate court under the following circumstances. First, where from the record of appeal, the findings of fact by the trial court were clearly not supported by evidence on record and the reasons in support of the findings were unsatisfactory; second where the findings of fact by the trial court could be seen from the record of appeal to be either perverse or inconsistent with the totality of evidence led by the witnesses and the surrounding circumstances of the entire evidence on record, third, where the findings of fact made by the trial court are consistently inconsistent with important documentary evidence on record, and fourth, where the first appellate court had wrongly applied a principle of law.* ***In all such situations the second appellate court must feel free to interfere with the said findings of fact, in order to ensure that absolute justice was done in the case." Emphasis***

See also cases like

1. ***Jass Company Ltd. v Appau [2009] SCGLR 265***
2. ***Awuku Sao v Ghana Supply Co. Limited [2009] SCGLR 710***
3. ***Fosua & Adu-Poku v Dufie (Deceased) and Adu Poku Mensah [2009] SCGLR 310 per Ansah JSC and 313 per Dotse JSC respectively.***

See also the recent application of the above principle by our respected and esteemed brother, **Pwamang JSC in the unreported decision of this court in Suit *No. CA/J4/4/16 dated 29th June 2016* intitutled**, ***Mrs Vivan Aku Brown Danquah v Samuel Languaye Odartey.***

In the determination of the grounds of appeal urged and argued before us in this court, we would therefor consider first whether the invitation being made to us by learned counsel for the Defendants, Thomas Hughes in his statement of case on behalf of the Defendants to the effect that, *"if the findings and conclusions of the court are supported by the evidence on record, the appellate court would not disturb those findings and conclusions.* ***However, if this court as a final appellate court comes to the conclusion that the findings are not supported by the evidence on record or that, the court below based its judgment on a wrong proposition of law, it will set aside the findings and reverse the judgment."*** It was after the above statement that learned Counsel for the defendants referred to the unreported decision of this Court in the ***Vivian Aku Brown Danquah v Samuel Languaye Odartey*** case referred to supra.

We have thus apprized ourselves with the grounds of appeal argued before us by learned counsel for the Defendants and Plaintiffs bearing in mind the application for the principle on concurrent findings of fact by two lower courts.

DISMISSAL OF FRIVOLOUS APPEALS

Ordinarily, in our considered opinion, the issues raised in this appeal admit of no complexities whatsoever, and could have been dealt with summarily by reliance on section 34 of the Courts Act, 1993, Act 459 which provides as follows:-

> ***34. Dismissal of frivolous appeals***
>
> ***(1)" The Supreme Court may summarily dismiss an appeal which is frivolous or vexatious or does not show a substantial ground of appeal, without calling on a person to attend the hearing.***
>
> ***(2) Without prejudice to subsection (1), an appeal against conviction in a criminal case may be dismissed summarily under that subsection where the appellant had been convicted on a plea of guilty."***

However, since this court has not been relying on the said provisions of procedure in the Courts Act to dispose of appeals that are deemed to lack substance and merit, we have reluctantly decided to deal in extenso with this appeal **whilst reiterating the need for the Chief Justice, and also urging our brethren in this court to come out with a practice direction to aid this court pending an enactment that will facilitate the summary disposal of appeals that are deemed not to be worthy of any serious consideration.**

GROUNDS OF APPEAL

It is now generally settled, that an appeal constitutes a re-hearing. What the re-hearing implies is an evaluation of the evidence and assessment of all documentary evidence and case law.

See ***Tuakwa v Bosom [2001-2002] SCGLR, 61*** which has been followed in a long line of cases such as:-

1. ***Ago Sai v Kpobi Tetteh Tsuru III [2010] SCGLR 762,***
2. ***Gregory v Tandoh IV and Another, already referred to supra specifically at page 996***
3. ***Abbey v Antwi [2010] SCGLR at 17, specifically at pages 34 and 35***
4. ***Djin v Musah Baako already referred to supra, just to mention a few.***

GROUND B – CAPACITY

In view of the incisive effect and nature of the issue of capacity that has been raised, we deem it expedient to consider that first.

Relying on a number of respected judicial decisions, the Defendants argued per their learned counsel Thomas Hughes that, since ***"the plaintiff, as an Executor of the Will was only to vest the property in the said families and after that she could not claim to be a Trustee of the family having vested same in the families. In the absence of the consent of the families the Plaintiff even if it is admitted had any interest in the land, it was limited to what she was given and in this case one-fourth (1/4th) of the land which gave no size or description of the land devised in the Will. In the circumstance's the learned trial judge erred in***

saying that since the Plaintiff had tendered the Will with probate attached and Appellants have not disproved that the other Executor was dead, then the Plaintiff had capacity to issue" *Emphasis*

Based on the above arguments, learned counsel for the Defendants urged this Court to set aside the previous decisions of the trial High Court and the Court of Appeal.

Some of the authorities relied on by learned counsel for the Defendants are the following:-

1. ***Kwan v Nyieni [1959] GLR 67 C.A***
2. ***In re-Ashalley Botwe Lands, [2003-2004] SCGLR 420***
3. ***Manu v Nsiah [2005-2006] SCGLR 25 at 30 per Lartey JSC***
4. ***Neequaye (Dec'd), Adea Kotey v Kootse Neequaye [2010] SCGLR 348 at 355***.

From the above cases, it is apparent that capacity whenever it is raised in a legal dispute in court must be determined first, because it is only after the court has declared a party as having capacity to mount the suit that the court can proceed to consider the case on its merits.

On this issue of capacity, learned counsel for the Plaintiff, Ekow Egyir Dadson, argued that the capacity of the plaintiff to institute the action in the High Court had been admirably dealt with by the lower courts and he concluded his submissions thus:-

> "*The true position is this.* ***The nature of the Respondents capacity in this suit is that, she sued as an Executrix of a will. She also sued as a***

beneficiary under that will. The subject matter of the suit is land that was devised under a will. The only person clothed with legal capacity to sue in respect of property in a Will is either the executor or beneficiary. The Respondent sued as a surviving Executrix and also as a beneficiary under the Will. *The challenge, in order to have any force should have been to her status as an Executrix or beneficiary and not as head of family a position she has never desired to either by her pleadings or evidence. Part of the "property" land was devised to a family, the Executor has the capacity to sue and sued in respect of that property". Emphasis*

Learned counsel for the Plaintiff then also referred the court to the following respected judicial decisions, ***Djin v Musah Baako*** already referred to supra and ***Re-Bill (Dec'd) Abeka v Tetterly Bill and Anr [2007-2008] SCGLR*** 66, ***Kwan v Nyieni*** already referred to supra.

We have verified the contending positions of learned counsel against the record of appeal and the applicable law.

From the appeal record, there is a certificate of authentication from the Public Records and Archives Administrative Department marked as No. 0901930 authenticating probate issued from the Registry of High Court, Accra, dated 5th day of May 1988, indicating that, the original Plaintiff herein, Comfort Ofeibea Dodoo and Nii Ashie Hammond a.k.a Nii Djase were appointed as the Executor and Executrix of the Will of Mercy Naa Aponsah a.k.a Mrs. Mercy Dodoo the Testatrix therein.

There is also proof that, the original Plaintiff herein, was in addition to her being appointed an Executrix under the Will, also a beneficiary as per devises made therein in the Will.

We have also verified from the record of appeal, and there is infact no controversy about this, that as at the time of the institution of the instant action in the High Court, only the original Plaintiff, and one of the two Executors was alive. That being the case, she was the only person legally clothed to have instituted the action to protect the properties, the subject matter of the devises under the will.

We have also verified and confirmed the devises of the disputed land in paragraph 3 of the Will to the original Plaintiff herein, and the other beneficiaries therein named.

But for the vehemence and industry which learned counsel for the Defendants spent in belabouring arguments on this issue of capacity which we have concluded is completely misguided and without any basis and substance whatsoever, we would have summarily dismissed this argument.

However, we have as a prelude to our invocation of the provisions in section 34 of the Court Acts, 1993, Act 459, already referred to supra, decided to be detailed.

We have already made the necessary findings of fact consistent with our position on concurrent findings of fact by the trial court and the first appellate court.

We also note that, our brethren in the Court of Appeal adequately dealt with this issue of capacity and learned counsel for the Defendant should have taken a cue from that legal education.

Out of abundance of caution, it is considered prudent and worthwhile at this stage to reproduce the salient aspects of the Court of Appeal rendition on this subject matter as follows in the unanimous judgment of the court delivered by Aduama-Osei (JA)

> *"I have looked at the Will at page 283 to page 285 of volume 2 of the Appeal Record and I find that the plaintiff was indeed appointed as an executrix under it." I also notice from the Vesting Assent, which is at page 313, of Volume 2 of the Record, that by it,* ***the Plaintiff as "the only surviving personal representative and executrix of the Will of the late Mrs. Mercy Amponsah Dodoo" assented to the vesting of the disputed land in "Mrs Comfort Ofeibea Dodoo as beneficiary and also to hold same in trust for the Ato We (Family) Adjebua We Family, and Ayikushie family".***
>
> *To the best of my understanding, by the above-quoted words in the Vesting Assent, the Plaintiff has vested the disputed property in herself as a beneficiary, and has also made herself a trustee for the Ato We, Adjebua We and the Ayikushie We families in respect of the said property.*
>
> *I notice that during the cross-examination of the current Plaintiff, it was suggested to her that Comfort Ofeibea Dodoo had no right to vest the properties in her name.*

That may well be so. ***But then it is up to the other beneficiaries to challenge her right to do so, if they feel aggrieved. Looking at the Vesting Assent as it stands now, it proves a vested interest on the part of the Plaintiff in respect of the disputed property. I am aware of the contention by Counsel for the Defendants that the vesting assent is a nullity, and that the Will itself is invalid. I do not however consider that contention a helpful contribution in this discussion on capacity. This is because probate of the Will has not been set aside.***

If therefore the vesting assent is a nullity, it will only mean that the properties devised under the Will have not been distributed yet, and with the death of Nii Ashie Hammond, the Plaintiff remains the only person clothed with capacity to deal with any of those properties.

In my view, the record discloses such interest on the part of the Plaintiff in respect of the subject matter of this suit as to entitle her to a hearing. I accordingly dismiss Ground 2 of this appeal. Emphasis

However, we in this court, whilst agreeing in substance with our brethren in the Court of Appeal, we wish to clarify a few points for purposes of emphasis.

1. The Plaintiff who instituted the action against the defendants had capacity to do so under both the principles stated in ***Kwan v Nyieni (supra)*** line of cases and ***Djin v Musah Baako*** referred to supra.

2. The Will of the Deceased Testatrix, probate of which had been granted by the High Court remains valid unless set aside by a party who has the requisite capacity.
3. Similarly, all the devises made under the Will, to the beneficiaries therein named remain valid and subsisting.
4. If anything at all, it is the Vesting Assent by the Plaintiff herein as a Trustee that may be called into question by the recognized and valid persons with capacity.
5. The principle of nullity introduced as a red herring by the Defendants has not and will not affect the validity of the Will and the Devises made thereunder.

Finally, and quite importantly those persons propounding the contention that the Will and the Devises made thereunder are null and void should re-think their position. It will not be enough to instigate anybody or group of persons and urge them by inducements to style themselves as representatives of the other beneficiaries under the Will to question the validity of the Will and the Devises therein made. It has become too common for people with a communal interest in landed properties to connive with greedy land litigants and seek to deprive their own inheritance for a mere pittance.

The interest of such persons must be properly evaluated in the broader interest of the competing interests and the timely nature of their conduct.

Save for the above comments and clarifications, we also likewise dismiss this ground of appeal on capacity as unmeritorious.

GROUND A

We have evaluated the principles of the findings of fact made by the learned trial Judge and concurred in by the first appellate court. We are of the considered opinion that there is really no basis to overturn the judgments of the two lower courts.

This is consistent with our position on concurrent findings of fact made by the two lower courts which are consistent with the evidence on record and supported by documentary and viva voce evidence.

See ***Obeng v Assemblies of God Ghana*** (referred to supra) line of cases already dealt with.

The Plaintiff testified on her own behalf and called eight (8) witnesses.

It is important to stress that, whilst Plaintiff testified on essential matters and laid a strong basis for the various overt acts of ownership which she and her predecessors have exercised in respect of the land in dispute, the Defendants even though also testified and called seven (7) witnesses, the combined effect of their testimony did not measure up to the standard set by the Plaintiff and her witnesses.

Mention must be made of the fact that, even though the Plaintiff did not call any direct boundary witness, her testimony and those of her witnesses were more than convincing. It was this which led the learned trial Judge to conclude that boundary witnesses were called by the Plaintiff.

In her evidence in chief, the Plaintiff testified that, her predecessor in title, Klorkor Klotey, travelled to Atoman with her husband and acquired the land in dispute from Nana Ampah

and another and paid for same with cowries which was the medium of exchange (legal tender) in those olden days.

THE LAND OWNERSHIP LINEAGE OF THE PARTIES

The Plaintiff founded her claims to the disputed land on it's purchase by her great great ancestor called Klorkor Klottey.

This event we are told happened several generations ago, about 200 years.

What is to be noted is that, after purchase, Klorkor Klottey permitted his brother called Klottey a.k.a Ato, to live on the land and establish ownership rights. Hence the creation of the Atoman village. This Ato, according to the evidence on record permitted several Ewe Settler farmers to settle, farm and perform several overt acts of ownership on the land whilst, attorning yearly tenancy to the original owner of the land, her representatives and assigns throughout the years.

With the passage of time, the following persons succeeded Klorkor Klotey and her brother Ato in the following descending order, Mary Adjeley Adjei, then Mercy Naa Aponsah a.k.a Mrs. Mercy Dodoo, who is the Testator who made a Will devising portions of the disputed land to Comfort Ofeibea Dodoo, the original Plaintiff and then to the present substituted Plaintiff, Vivian Naa Kwamah Ankrah.

It must also be re-emphasised that, the various generations of settler farmers mostly, Ewes and their successors who have lived on the land in dispute but attorned tenancy to

the Plaintiff and her predecessors in title have all testified in proof of the above overt acts of ownership.

Using conservative computations of time, we are of the considered view that the 200 years of the purchase of the land by the original owner, Klorkor Klotey through the various predecessors named supra is consistent with the said 200 years of time.

1ST DEFENDANTS ANCESTRY

According to the 1st Defendants, their land was founded by Nii Tetteh Mensah during farming and hunting expedition in 1910. According to the evidence of the substituted 1st Defendant David Aweletey Obodai, the land was founded by his grandfather Nii Tetteh Mensah who founded same during hunting and farming in 1910. He stated further that, the original 1st Defendant, Nii Amartey Mensah (now Deceased) and his mother have the same father.

The substituted 1st Defendant stated during his evidence in chief that the original 1st Defendant was a grandson of the founder of the land, Nii Tetteh Mensah.

On the whole, the evidence of the 1st Defendant lacks credibility on the genealogy of his ancestry. He claims he was born in 1953, and that the original 1st Defendant was born before the original founder of the land died.

Considering the time of the alleged hunting expedition in 1910 and bearing in mind that the suit was instituted in the year 2000, and further taking into view the circumstances of the land, being so close to Accra and juxtaposing it with the evidence of the plaintiff

and her ancestry line with the various overt acts of ownership performed by them and on their behalf, the 1st Defendant's evidence pales into insignificance and lacks credibility.

SPECIFIC EVALUATION OF THE PLAINTIFF'S EVIDENCE

She continued her evidence to the effect that, after the purchase, by her ancestor Klorkor Klotey, she permitted her bother Ato to take care of the land and accordingly exercised overt acts of ownership. Specie of such conduct lay in Ato establishing the Atoman village and permitting some Ewe settler farmers to live and farm on the land.

It is interesting to observe that, some of these Ewe settler farmers still have their descendants on the land in dispute.

The Plaintiff mentioned the following as some of the settler villages established by the farmers on the disputed land as Ogborvi Kope, Kwaku Achim Kope, Gbedema Kope, Osuame-Kope, Ahiase-Kope and others.

She added that, the dispute is in respect of the land occupied by all the said villages. According to the Plaintiff, the headmen of these settler villages attorned tenancy to her predecessors in title and that was the nature of the relationship between them to date with their predecessors.

The Plaintiff also explained the circumstances under which the Survey Map in respect of the land was prepared with notice to all the boundary owners who were present to authenticate the boundaries.

The Plaintiff testified that, during the preparation of the survey plans that was used by her predecessors for the land documents tendered into evidence, notice was given to all the boundary owners to come forward and ascertain the fact of the boundary with her predecessor's lands.

After stating the boundaries of the land as sharing boundary on the north with Kofi and Agyiri, on the South by Nii Kpakpo Oti, on the West by Armah and on the East by Otoo Kwao, the Plaintiff continued that, all the boundary owners mentioned supra, came for the survey with their respective caretakers, who walked around the boundaries, ascertained same by cutting their known boundary lines.

The Plaintiff concluded that, all the persons present accepted the boundary line that was drawn after which the document was prepared and presented to the Land Commission at Koforidua because by that time, Amasaman was in the Eastern Region, whose capital was Koforidua.

In proof of the above evidence a letter on page 309 of Volume 2, dated 31/10/2002 which originated from the Lands Commission, Koforidua to the Executive Secretary, Lands Commission, Accra and it reads as follows:-

> ***"Re-Plotting of Document in the Greater Accra Region – Declaration No. ER. 257/79"***

The attached document which was originally plotted in the records of the Eastern Region Lands Commission is re-submitted by the applicant for plotting in the Greater Accra Records since the site now falls within the latter region."

We have seen another letter to the same effect dated 15th May 2007 on page 310 of volume 2.

We have also sighted three letters, all dated 20th October 1988 written by Charles Hayibor Esq, acting for and on behalf of the original Plaintiff wherein the services of one Kpakpo who acted as caretaker of the Plaintiff had been withdrawn and another caretaker, Aryee Muslim appointed in his place.

Besides the above pieces of evidence which were not shaken during cross-examination, the Plaintiff called the following witnesses.

P.W1- Oppong Yaw Mensah, Registrar of the High Court, Accra who was subpoenaed to tender an Amended Statement of Defence filed on 1/6/2010 in suit No. L. 547/97, intitutled***, Nii Okine Dorwose Lokko, substituted by Deitse Djanie v Vivian Naa Kwawa Ankrah***

P.W.2 - Anane Foli- Farmer and Caretaker

This witness testified that, his father Foli Kavege, was a caretaker of the original **Plaintiff for well over 40 years and that after his father's death, he took over as** caretaker on Atoman village. **He testified that whilst there had been caretakers long before**

his father, who was a caretaker for 40 years, at the time of his evidence he had been caretaker for 30 years, making it 70 years as between him and his father alone.

This witness also confirmed the clearing of the boundary lines by the respective land boundary owners before the survey was prepared.

He also confirmed the fact that all the caretakers before him and he himself attorned tenancy to the plaintiff's predecessors or to the Plaintiff.

He also confirmed the existence of all the villages mentioned by the Plaintiff.

PW3 – Agnes Ogborvie Dede

This witness at the time she testified was 90 years. She said that, it was her husband who acquired the land from Plaintiff's predecessor and established the village and named it after himself. She indicated that she had been in the village for almost 50 years. From the evidence of P.W.3, the impression is clear that the Plaintiff and her predecessors performed various overt acts of ownership on the land without let or hindrance from the defendants whatsoever.

PW4 – Nii Amo Djan

This witness established himself as a pensioner, aged 84 years at all material times and the Chief of Djanman and head of the Nii Djan Family. **His evidence is significant in the sense that he admitted that the land boundaries mentioned by the**

Plaintiff, and confirmed by PW2 Anane Foli as the caretaker of Atoman village belongs to the Plaintiff and her predecessors. He also confirmed that he has known the said PW2 since the time he was enstooled as Chief in 1973.

PW5 – Anthony Yaw Dadali

Like PW2, Anane Foli, PW5 was also born and bred at Ogbovikope. Indeed, he confirmed that it was PW2's father who gave his father permission to farm, settle and then founded Ogbovikope, as his father was called Ogbovi Dadali.

Like the other witnesses before him, he and his father all performed overt acts of ownership with the leave and license of the Plaintiff and her predecessors. The father of this witness cultivated palm plantation on the land.

What is significant about all these witnesses who have settled on the land of the Plaintiff is that, the Defendants were not able to disturb their evidence during cross-examination.

PW6 – David Doe, a Staff of the Lands Commission, an Assistant Chief Recording Officer

The significance of the evidence of this witness lies in the fact that he confirmed the existence of land document No. 1582/1979 in the name of the original Plaintiff herein.

He further explained that, land document No. 1582/1979 in the name of Comfort Ofeibea Dodoo was earlier registered as No. ER 257/79.

PW7-Jacob Annan

He was called in his capacity as a Technical Officer at the Lands Commission at all material times in Koforidua. This evidence is significant for the reason that it confirmed that before the establishment of the Greater Accra Region, plotting and registration of title documents of lands in Amasaman like the land in dispute were done in the Koforidua office up to and including 1979.

The last witness called by the Plaintiff is PW8, Yaw Logo

This witness is also a settler farmer who lived with his father and others on portions of the land in dispute, e.g. Logokope, Ogbovikope where he and his parents farmed at the instance of the original Plaintiff. He also knew PW2, Anane Ofori and confirmed in all material particulars the establishment of the settler villages on the disputed land as well as the attornment of tenancy to the Plaintiff and her predecessors in title. Of particular importance is the evidence by PW8 that he was one of the five people who took part in the clearing of the boundary lines for the purpose of the Survey that was undertaken.

In brief, this is the evidence of PW8 on the question *"as to how many of them participated in the clearing"*.

Answer: "***We were five, being Kpakpo, Yaw Logo, Anane Ofori, Ofori Mensah, Mensah and Kwaku Agbewordi. It took us two months to clear the boundary.***

We were instructed by Comfort Ofeibea Dodoo to demarcate. During the demarcation of the boundary, nobody confronted us*. Comfort Ofeibea Dodoo fed us during the clearing of the boundary.* ***There are 4 cemeteries on the land. These are at Atoman, Logokope, Osuamekope and Ogbovikope. These cemeteries were established on the authority of Comfort Ofeibea Dodoo."*** *Emphasis*

Finally, the witness denied that the 1st Defendant owns the land in dispute in very categorical terms.

COMMENTS ON OVERT ACTS OF OWNERSHIP OF THE PLAINTIFF

In the unreported decision of the Supreme Court in C. A. J4/41/18 dated 28th November, 2018 intitutled, ***Fred Robert Coleman v Joe Tripollen and 4 Others***, the court in expatiating on what constitutes overt acts of ownership, held as follows:-

> *"For example, we all know that, ordinarily, dead people are not buried clandestinely in the night. Besides, burial of a corpse on a land connotes ownership and an incident of overt acts of possession and ownership. The Plaintiff succeeded in showing the tombstone of the grand mothers who died in 1931 and the Defendants cannot feign ignorance of the above." Emphasis*

By parity of reasoning the Plaintiff has in this case authorised the establishment of about four different cemeteries on different parcels of the land in dispute which are being occupied by the agents and assigns of the Plaintiff. This is definitely an overt act of ownership.

DEFENDANTS AND THEIR WITNESSES

On the contrary, the 1st Defendants evidence is nothing to write home about. In essence, the Defendant testified that his predecessor was called Nii Tetteh Mensah who was a hunter and farmer, and he founded the land during his hunting expedition and settled on it in 1910. Having examined and evaluated the entire testimony of the 1st Defendant, the boundary owners he named as sharing boundary with and the application of guiding principles on ascertaining traditional evidence, we are of the considered view that the 1st Defendant has not given such credible evidence that can match that of the Plaintiff and her witnesses.

For example, out of the seven (7) witnesses called by the Defendants, two (2) are technical and or expert witnesses.

These are *D.W.4, Emmanuel Bampo licensed Surveyor and D.W.7 David Doe*, who works with Lands Commission in the Land Registration Division.

DWI, Robert Ralph Ebenezer Hugh Tagoe, a retired Customs Officer and DW2, David Annoh Quarshie, a retired D.C.O.P aged 81 years both of whom are pensioners claim to be adjoining land owners who share boundary with the 1st Defendants for barely 20 and 18 years respectively. In the case of DW2, it is clear that his land is not at Kpobiman, but at Sapeiman and appears not to know much about the disputed land.

From his answers during cross-examination, on pages 405 to 406 Volume 1 it is certain that the witness is not truthful and his evidence has been very well discredited.

The remaining two witnesses, *D.W.5, Selasi Kofi Segbao and D.W.6, Amahia Mawutor are also settler farmers.*

D.W.5 testified that, he was born on Ozuamekope and has lived there all his life. He further stated that this village is near Sapeiman and is on a boundary with villages which shares boundary with the land in dispute.

Indeed during cross-examination, DW5 confirmed that he has ever worked for PW8, the headman or caretaker of the Plaintiff in his village before.

He also confirmed the status of PW2 and PW3, *Anane Foli and Agnes Ogborvie* respectively and their tenancy relationship with the Plaintiff.

DW6, Amahia Mawutor can be described as an untruthful witness who appeared to us not to know much about the disputed land.

In as much as this witness tried to deny the obvious, **he nonetheless had to admit the status of Anane Foli, PW2, PW3, madam Agnes Ogborvi and Yaw Logo PW8 and their relationship with the Plaintiff vis-à-vis the disputed land**.

APPLICABLE TEST TO DETERMINE CONFLICTING TRADITIONAL EVIDENCE

One matter which has attracted our attention in this delivery is the issue and significance of traditional evidence. What must be appreciated is that, both parties relied basically on traditional evidence. Secondly, it must also be further appreciated that this is what they all used to procure the fixing of their boundaries and eventually their documents of title.

However, in assessing the various pieces of traditional evidence, it is worthwhile to take into consideration the admonition by Lord Denning in ***Adjeibi-Kojo v Bonsie (1957) 3 WALR 257 at 260 PC***, where the distinguished legal luminary opined as follows:-

> *"Once traditional history is handed down by word of mouth, it must be recognszed that,* ***in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatever****. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago." Emphasis*

In the celebrated case of ***Adwubeng v Domfeh, [1996-97] SCGLR 660 at 671, Acquah JSC*** (as he then was) posited as follows:-

> ***"Accordingly, a court cannot simply reject a party's traditional evidence on such petty and trifling matters." Emphasis***

Indeed the Privy Council in the earlier case of ***Ebu v Ababio (1956) 2 WALR 55 at 57***, stated as follows:-

> ***"Traditional evidence has a part to play in actions for declarations of title but there are cases in which a party can succeed even if he fails to obtain a finding in his favour on the traditional evidence. "Emphasis***

Having evaluated the pieces of traditional evidence given by the parties in this case, we are now faced with applying the appropriate test that are to be applied.

The Court of Appeal per Edward Wiredu JA, (as he then was) addressed these concerns in the case of ***In re Adjancote Acquisition, Klu v Agyemang II [1982-83] GLR, 852, particularly at 857*** where the court unanimously set out the following as a guide.

1. *"Oral evidence of tradition is admissible in the courts of West Africa and may be relied upon to discharge the onus of proof if it is supported by the evidence of living people of facts within their own knowledge". See* ***Commissioner of Lands v Adagun (1937) 3 W.A.C.A 206.***
2. *"Where it appears that the evidence as to title is mainly traditional in character on each side and there is little to choose between the rival conflicting stories, the person on whom the onus of proof rests must fail in the decree he seeks".* ***See Kodilinye v Odu (1953) 2 W.A.C.A 336 and Abakum Effiana Family v Mbibado Effiana Family [1959] GLR 362.***
3. *"Where there is a conflict of traditional history, the best way to find out which side is probably right is* ***by reference to recent acts in relation to the land." See Yaw v Atta [1961] GLR 513.***
4. *"Where claims of parties to an action are* ***based upon traditional history which conflict with each other, the best way of resolving the conflict is by paying due regard to the accepted facts in the case which are not in dispute, and the traditional evidence supported by the accepted facts is the most probable case." See Beng v Poku [1965] GLR 167***

5. *"Where the whole evidence in a case is based on oral tradition not within living memory, it is unsafe to rely on the demeanour of the witnesses to resolve conflicts in the case, see* ***Adjeibi-Kojo v Bonsie*** *already referred to supra".*

Applying some of the above principles, and guidelines, the Supreme Court in a unanimous decision in the case of ***Adjei v Acquah & Others [1991] 1 GLR 13,*** particularly at page 19, held as follows:-

> "*The law was that although traditional evidence had a part to play in actions for declaration of title, a favourable finding on its evidence was not necessarily essential to the case of the party seeking the declaration.* ***What the authorities required was that traditional evidence had to be weighed along with recent facts to see which of the two rival stories appeared more probable. Facts established by matters and events within living memory, especially evidence of acts of exercise of ownership and possession must take precedence over mere traditional evidence." Emphasis***

Quite recently, the Supreme Court in the case of ***Achoro v Akanfela [1996-97] SCGLR 209***, particularly at 213, Acquah JSC, (as he then was) spoke with unanimity as follows:-

> "*Now part of the evidence led by both parties is traditional,* ***and the best way of evaluating traditional evidence is to test the authenticity of the rival versions against the background of positive and recent acts." Emphasis***

Finally, in the case of ***In Re Taahyen and Asaago Stools; Kumanin II (substituted by) Oppon v Anin [1998-99] SCGLR 399****, the Supreme Court held in holding one as follows:-*

"in assessing rival traditional evidence, the court must not allow itself to be carried away solely by the impressive manner in which one party narrated his version, and how coherent that version is, ***it must rather examine the events and acts within living memory established by the evidence, paying attention to undisputed acts of ownership and possession on record;*** *and then see which version of the traditional evidence, whether coherent or incoherent,* ***is rendered more probable by the established acts and events.*** *The party whose traditional evidence such established acts and events support or render more probable must succeed unless there exists, on the record of proceedings, a very cogent reason to the contrary." Emphasis*

Based on all the above discussions, we re-state and re-emphasize the essential guidelines for assessing traditional evidence by the court as follows:-

1. The Court must be slow in being carried away by the impressive manner in which a party narrated his or her version of the traditional evidence and how coherent or methodical that is.
2. **The Court must pay particular attention to undisputed acts of overt acts of ownership and possession on record in addition to an examination of**

the events and acts therein within living memory which have been established by evidence.

3. Consider which of these narratives is more probable by the established acts of ownership.
4. **Finally, the party whose traditional evidence coupled with established overt acts of ownership and possession are rendered more probable must succeed unless there exists on the record other valid reasons to the contrary.**

In applying these guidelines to the instant appeal, one clearly discernible principle which we have to apply are satisfactory contemporary and undisturbed overt acts of ownership and or possession exercised over the subject matter.

In this respect, the evidence by the Plaintiff and her witnesses, coupled with the several overt acts performed by her and the settler farmers on the land over a long period of time are too notorious to be glossed over by this court.

We accordingly disregard the recent acts of trespass which lie in the acts of plunder, pillage, thuggery and banditry exercised by the Defendants and their agents when they invaded the disputed land to lay it to waste in sand winning and other acts of trespass.

In our considered opinion, the evidence of recent events on matters within living memory and testified to by the Plaintiff and supported by her witnesses and also partly by the Defendants witnesses DW5, Selasi Kofi Segbao and DW6 Amahia Mawutor clearly show that certainly, more credible weight has to be given to the Plaintiff's traditional evidence

than the Defendants, which are full of inconsistencies, contradictions, and weaknesses which cannot be glossed over. See case of ***Osei Yaw and Anr. v Domfeh [1965] GLR 418,*** where the Supreme Court held that:-

> ***"Where the evidence of one party on an issue in a suit corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses****, a court ought not to accept the uncorroborated version in preference to the corroborated one, unless for some good reason (which must appear on the face of the judgment) the court finds the corroborated version incredible or impossible. "Emphasis*

See also ***Tsrifo v Dua VIII [1959] I GLR 63, at 64 -65*** approved by the Supreme Court in the above case.

See also ***Asante v Bogyabi & Others, [1966] GLR 232*** which applied in principle, hook, line and sinker the principle of law decided in ***Yaw v Domfeh*** referred to supra.

In the case of ***Abbey and Others v Antwi V, [2010] SCGLR 17***, this court in a unanimous decision held in holding 2 as follows:-

> *"In an action for declaration of title to land,* ***the Plaintiff must prove, on the preponderance of probabilities, acquisition either by purchase or traditional evidence, or clear and positive acts of unchallenged and sustained possession or substantial user of the disputed land".*** Emphasis

Applying the above principles, we are of the firm view that the Plaintiff and her witnesses have demonstrably established hard facts of overt acts of ownership and possession coupled with recent and contemporaneous acts by their predecessors consistent and in tandem with accepted legal principles. Based on the above and from our analysis of the concurrent findings of fact made by the two lower courts, which we have analysed supra, we have no hesitation in confirming the decision of the Court of Appeal.

EPILOGUE

In coming to our conclusion, we have taken into consideration the entire record of appeal, which includes the pleadings, viva voce evidence, documentary evidence and all the submissions of learned counsel. We have also considered the lame attempt by the Defendants to introduce the evidence of fraud on the part of the plaintiff. We however dismiss all these claims by the defendants as we consider them not having been adequately proven.

In the premises, the appeal herein by the Defendants against the judgment of the Court of Appeal dated 12th May 2016 in favour of the Plaintiff fails and is dismissed in limine. The said judgment is thus affirmed in it's entirety.

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

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